



On February 5, 2018, this Court directed plaintiffs to provide additional briefing to address why *In re Hyundai and Kia Fuel Economy Litigation*, 881 F.3d 679 (9th Cir. 2018) does not apply and to conduct the choice of law analysis that *Hyundai* envisions. This Court also invited defendants to file a brief, which they now do both i) to explain that *Hyundai* is at odds with the law in other federal courts, notably the Third Circuit, and ii) to ask this Court to defer its ruling in this matter until the Ninth Circuit has concluded its proceedings in *Hyundai*.

**I. DIFFERENCES BETWEEN APPLICABLE STATE LAW NEED NOT BE CONSIDERED IN THE PRESENT CONTEXT**

In *Sullivan v. DB Investments, Inc.*, the Third Circuit explained that the certification of a nationwide settlement class involves a “diminished concern regarding variations in state law” as compared to a litigation class. 667 F.3d 273, 302 (3d Cir. 2011). The Third Circuit’s “consideration of varying laws in the context of predominance has primarily focused on manageability of a litigation class.” *Id.* at 303. Because issues related to the manageability of a class action trial need not be considered to certify a settlement class, the *Sullivan* court reasoned that the “predominance analysis for certification of a settlement class” is different than “that required for certification of a litigation class.” *Id.* While the Third Circuit remained “cognizant of [its] responsibility to protect absentees by blocking unwarranted or overbroad class definitions,” it deemed “state law variations [to be] largely irrelevant to certification of a settlement class.” *Id.* at 304 (internal citations and quotation marks omitted). ADT believes that, in line with *Sullivan*, this Court should be able to certify a settlement class without assessing differences between applicable state law, absent a colorable objection to the settlement related to such differences.

To the extent that *Hyundai* is at odds with this view of the law, it appears to have created or continued a circuit split. Because this Court is bound by *Hyundai* unless and until it is modified or reversed, ADT raises this argument strictly for the purpose of preservation.

1 **II. THIS COURT SHOULD DEFER ITS RULING ON PLAINTIFFS' MOTION FOR**  
2 **FINAL APPROVAL OF SETTLEMENT**

3 As this Court noted at the February 1, 2018 Fairness Hearing in this case, some  
4 commentators "regard[] *Hyundai* as a massive change." 2/1/18 Tr. 50:13 – 51:2 (attached as Ex.  
5 A). But the January 2018 *Hyundai* decision is not necessarily the Ninth Circuit's last word on the  
6 matter. Counsel in *Hyundai* plan to file a petition for *en banc* review of the *Hyundai* decision. *See*  
7 Order Extending Deadline to File Petition for Rehearing *En Banc* (attached as Ex. B). In fact, it  
8 appears that at least one amicus curie brief will be filed in support of that petition. *See* Petition for  
9 Rehearing *En Banc* (attached as Ex. C). The Petition is due on March 8, 2018. Ex. B.

10 Due to the potential for *Hyundai* to represent, in the words of this Court, a "sea change,"  
11 ADT requests that the Court defer its ruling on Plaintiffs' Motion for Final Approval of the  
12 proposed nationwide settlement. Ex. A at 50:22 – 51:2. Such a potentially impactful case has a  
13 reasonable chance of meriting *en banc* review by the Ninth Circuit. Should the Ninth Circuit engage  
14 in such review, it is likely to provide, at the very least, clarity regarding the metes and bounds of  
15 the *Hyundai* decision, which would aid in this Court's review of the proposed *Edenborough*  
16 settlement. Deferring a ruling would also serve the interests of efficiency and judicial economy, as  
17 an *en banc* decision could reverse whatever changes the current *Hyundai* decision instituted, which  
18 would in turn necessitate an additional review of the proposed *Edenborough* settlement by this  
19 Court. Thus, deferring a decision until the Ninth Circuit either rejects the *Hyundai en banc* petition  
20 or rehears *Hyundai* would provide this Court with the maximum amount of clarity regarding Ninth  
21 Circuit case law while also avoiding superfluous analysis for this Court.

February 26, 2018

Respectfully submitted,

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